



## McGeorge Law Review

Volume 39

Issue 3 Symposium: *Ethics Across the Professions:  
Professional Ethics and Corporate Conduct*

Article 4

1-1-2007

# For You Alone - Dual-Investor Theory and Fiduciary Relationships

Eugene Schlossberger  
*Purdue University Calumet*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

### Recommended Citation

Eugene Schlossberger, *For You Alone - Dual-Investor Theory and Fiduciary Relationships*, 39 MCGEORGE L. REV. (2016).  
Available at: <https://scholarlycommons.pacific.edu/mlr/vol39/iss3/4>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# For You Alone? Dual-Investor Theory and Fiduciary Relationships

Eugene Schlossberger\*

## I. INTRODUCTION

Fiduciary relationships have become increasingly important in professional ethics. According to Mark Rodwin, “[t]he idea that physicians are or should be fiduciaries for their patients . . . is a dominant metaphor in medical ethics and law today.”<sup>1</sup> He further notes that “[t]he American College of Physicians declares that the physician is the advocate and champion of his patient, upholding the patient’s interest above all others” and that “members of the American College of Surgeons pledge to place the welfare of [their] patients above all else.”<sup>2</sup> Lester Brickman avers that “[t]he attorney-client relationship typifies a fiduciary relationship” and notes that “fiduciary obligations imposed on the lawyer include the duties of confidentiality, loyalty, safeguarding property, giving disinterested advice, and acting fairly towards the client.”<sup>3</sup> Joel Block points out that “CPAs may be considered fiduciaries to their clients when they render a variety of services including tax services, asset management and general business consulting.”<sup>4</sup> Fiduciary models have been invoked for a wide variety of fields and occupations, including government officials,<sup>5</sup> business and corporate managers,<sup>6</sup> engineers,<sup>7</sup> real estate appraisers,<sup>8</sup> and plumbers.<sup>9</sup>

---

\* Associate Professor of Philosophy at Purdue University Calumet, is the author of *MORAL RESPONSIBILITY AND PERSONS*, *THE ETHICAL ENGINEER*, *A HOLISTIC APPROACH TO RIGHTS: AFFIRMATIVE ACTION, REPRODUCTIVE RIGHTS, CENSORSHIP, AND FUTURE GENERATIONS*, and numerous articles in *ANALYSIS, MIND, PHILOSOPHICAL STUDIES, JOURNAL OF MARITAL AND FAMILY THERAPY*, and *BUSINESS ETHICS QUARTERLY*, among others.

1. Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 242 (1995).

2. *Id.* at 246-47 (internal quotations omitted and second alteration in original).

3. Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection*, 2003 U. ILL. L. REV. 1181, 1181-82, 1185-86.

4. Joel G. Block & Catherine DeBono Holmes, *Fiduciary Duties of a CPA/Business Advisor*, SAN FERNANDO VALLEY BUS. J., Apr. 28, 2003, § 9.

5. See John Alan Cohan, *A Fiduciary Model of Political Ethics and Protocol for Dealing with Constituent Requests*, 38 J. BUS. ETHICS 277 (2002).

6. See, e.g., Joseph F. Johnston Jr., *Natural Law and the Fiduciary Duties of Business Managers*, 8 J. MARKETS & MORALITY 27 (2005).

7. See Dinah Payne, *Engineering Ethics and Business Ethics: Commonalities for a Comprehensive Code of Ethics*, in INST. ELECTRICAL & ELECTRONICS ENG'RS REGION 5 CONFERENCE 81 (Apr. 11 2003), [http://www.sel.eesc.usp.br/informatica/graduacao/material/etica/private/IEEE\\_engineering\\_ethics\\_and\\_business\\_ethics\\_commonalities\\_for\\_a\\_comprehensive\\_code\\_of\\_ethics.pdf](http://www.sel.eesc.usp.br/informatica/graduacao/material/etica/private/IEEE_engineering_ethics_and_business_ethics_commonalities_for_a_comprehensive_code_of_ethics.pdf) (on file with the *McGeorge Law Review*).

8. See Dennis S. Tosh & William B. Rayburn, *Uniform Standards of Professional Appraisal Practice* (11th ed. 2004); see also Acorn Appraisal Assocs., *Appraiser Ethics*, [http://www.acornappraisal.net/Appraiser ethics](http://www.acornappraisal.net/Appraiser_ethics) (last visited Apr. 1, 2008) (on file with the *McGeorge Law Review*).

The traditional notion of a fiduciary relationship protects client interests against the fiduciary's contrary interests, e.g., requiring attorneys to advise clients about fee arrangements even when such advice adversely affects the attorney's financial interests.<sup>10</sup> More problematically, the prevailing notion of fiduciary relationships also protects the interests of clients against all others. This second aspect of the prevailing notion, requiring fiduciaries to exercise their powers exclusively for the benefit of the client,<sup>11</sup> often conflicts with broader social aims and values. The prevailing conception requires a wide range of what might be called "zealous duties" (patterned after the phrase "zealous advocacy"). Zealous duties are fiduciary obligations to act on behalf of clients in ways that would be wrong for the fiduciary to do for himself or herself (*pro se*), that is, to advance client interests by means that would ordinarily be unjust, unfair, or contrary to public welfare.

Zealous duties raise moral and legal questions. To what extent should the law permit or even require zealous duties? It might seem tempting to say that the law permits (or, in some cases, requires) fiduciaries to pursue their clients' interests in ways that, even if immoral, are not illegal when done *pro se*. However, the law grants some fiduciary relationships special immunities. Attorneys must keep confidential some client admissions that other citizens would be required to divulge. Conversely, an ordinary citizen does not have a legal duty to warn when hearing someone threaten to commit suicide, but a therapist does.<sup>12</sup> Thus it is merely a rough rule of thumb, with important exceptions, that the law permits fiduciaries to pursue clients' interests in just those ways that are not illegal *pro se*. It may be asked, then, both whether the law should require (and not merely permit) more or fewer obligations within those limits and whether the law should recognize more exceptions (thus either limiting or expanding zealous duties). Additionally, granted that fiduciaries should generally observe their legal duties, is it morally wrong, in the absence of a legal duty, for a fiduciary to pursue client advantage in ways that would be wrong for the fiduciary to do *pro se*?

Dual-Investor theory, which holds that society is an investor in all business ventures (including law firms and medical practices), casts some light on these issues. Dual-Investor theory received a brief articulation in 1993<sup>13</sup> and a detailed

---

9. See AM. SOC'Y OF PLUMBING ENG'RS, PLUMBING ENG'R'S VOLUNTARY CODE OF ETHICS (2001) (adopted Oct. 28, 2000), [http://aspe.org/\\_OLD/About\\_ASPE/aspe\\_ethics/CodeofEthics.pdf](http://aspe.org/_OLD/About_ASPE/aspe_ethics/CodeofEthics.pdf) (on file with the *McGeorge Law Review*).

10. See *Usipuk v. Jensen, Mitchell & Co.*, [1986] B.C.L.R.2d 283, 292-93 (Can.); see also Brickman, *supra* note 3, at 1209.

11. See, e.g., MARY C. HURLEY, LIBRARY OF PARLIAMENT, THE CROWN'S FIDUCIARY RELATIONSHIP WITH ABORIGINAL PEOPLES 2 (2000) (rev. 2002), <http://www.parl.gc.ca/information/library/PRBpubs/prb0009-e.pdf> (on file with the *McGeorge Law Review*).

12. See Eugene Schlossberger & Lorna Hecker, *HIV and Family Therapists' Duty to Warn: A Legal and Ethical Analysis*, 22 J. MARITAL & FAM. THERAPY 27 (1996).

13. See EUGENE SCHLOSSBERGER, THE ETHICAL ENGINEER (1993) [hereinafter SCHLOSSBERGER, THE ETHICAL ENGINEER].

exposition and justification in 1994.<sup>14</sup> The concept of stakeholder as shareholder has also been employed by Margaret Blair<sup>15</sup> and others.<sup>16</sup> While less well known than classic stakeholder and shareholder theories, some research indicates Dual-Investor theory is more convincing to business students.<sup>17</sup> The basic idea behind Dual-Investor theory is that every business venture makes essential use of goods and services provided by society.<sup>18</sup> For example, modern businesses can function only by making extensive use of an available knowledge base, provided, at great cost, by previous generations and contemporary researchers whose work is often subsidized directly or indirectly by society.<sup>19</sup> Henry Ford did not begin by re-inventing the wheel in his basement. Similarly, businesses rely upon roads and transportation networks, currency systems, educational systems, water supply systems, and police protection, whose considerable costs are borne by society.<sup>20</sup> These assets provided by society, which may collectively be termed "opportunity capital," are as essential to a business as the specific capital provided by ordinary investors such as stockholders.<sup>21</sup> Thus every business venture can be regarded as "owned" by two categories of investors: "shareholders, who provide the specific capital for the enterprise, and society, which provides the opportunity capital for the venture."<sup>22</sup> The venture thus owes a good return on its investment to both categories of investors, namely, ordinary shareholders and society. Business ventures can often meet their obligations to society simply by being good corporate citizens.<sup>23</sup> A grocery store that treats its customers and employees fairly and well, does not illegally dump refuse, and so forth, gives society a return on its investment: it pays taxes, provides employment, and offers a convenient way for residents to meet their nutritional needs.<sup>24</sup> Dual-Investor theory does place some limits on the normal pursuit of profit.<sup>25</sup> For instance, Dual-Investor theory ordinarily proscribes marginally increasing profit by omitting, without consumers' knowledge, an inexpensive but life-saving safety device or gouging

---

14. See Eugene Schlossberger, *A New Model of Business: Dual-Investor Theory*, 4 BUS. ETHICS Q. 459 (1994) [hereinafter Schlossberger, *A New Model of Business*].

15. MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995).

16. See, e.g., Amitai Etzioni, *A Communitarian Note on Stakeholder Theory*, 8 BUS. ETHICS Q. 679 (1998).

17. See Eugene Schlossberger, *The Middle Path: Using Dual-Investor Theory in Teaching Business Ethics*, 2 TEACHING BUS. ETHICS 127 (1998) [hereinafter Schlossberger, *The Middle Path*].

18. Schlossberger, *A New Model of Business*, *supra* note 14, at 461.

19. *Id.* at 461.

20. *Id.*

21. *Id.*

22. Schlossberger, *The Middle Path*, *supra* note 17, at 128.

23. Schlossberger, *A New Model of Business*, *supra* note 14, at 469-70.

24. *Id.*

25. See *id.* at 469-71.

consumers who have no choice but to pay.<sup>26</sup> However, to a large extent, businesses that operate in good faith can concentrate on attending to business.

Dual-Investor theory urges fiduciaries to maintain a similar balance between client and public interests.<sup>27</sup> Clients and fiduciaries are both indebted to society for providing the knowledge base and other investments of which both have made heavy use in order to become, respectively, a client and a fiduciary. For example, when either the client or the fiduciary is a legal or medical practice, society is an investor in that practice. Moreover, society maintains institutions enabling the establishment and conducting of fiduciary relationships, and hence the very existence of the fiduciary relationship between client and fiduciary would not exist without the contributions of society. At the very least, the “no bite” principle (named after the phrase “don’t bite the hand that feeds you”), which holds that it is *ceteris paribus* wrong to turn legitimate assistance offered against the one who offers the assistance,<sup>28</sup> suggests that the fiduciary’s pursuit of client interest should not be to the detriment of society. On a variety of grounds, then, Dual-Investor theory requires fiduciaries to balance social welfare against the pursuit of client interest.

Public fiduciaries, for the most part, face relatively few conflicts between their clients’ interests and the public interest, since their clients are, usually, the public itself; although, for example, a government social worker may bear some fiduciary duty to a program beneficiary whose relevant interests may conflict with those of the general public. Privately owned fiduciary concerns, in contrast, frequently bear fiduciary duties to non-public clients whose interests may conflict with the public interest, with the interests of third parties, or with basic values and the demands of fairness. Physicians bear fiduciary duties to individual patients whose interests and needs may conflict with the needs of non-patients and/or the requirements of fair dealing. Similarly, attorneys representing private clients bear fiduciary duties to those clients and a managerial accountant may bear fiduciary duties to a corporation or limited partnership. Nonetheless, private fiduciaries generally operate as part of a business venture, and so, if Dual-Investor theory is correct, bear a responsibility to society as well as to the client. Of course, since most fiduciary practices, such as medicine and law, provide an important social service, fiduciaries often provide a return on society’s investment simply by being faithful fiduciaries to their clients. For example, society as a whole benefits from the institution of medicine in which physicians attend faithfully to the medical needs of individual patients. While Dual-Investor theory places some limits on the normal pursuit of clients’ interests, fiduciaries that play fair can, to a large extent, concentrate on attending to their clients’

---

26. See Schlossberger, *The Middle Path*, *supra* note 17, at 133-34.

27. See *id.*

28. For more on the “no bite” principle and its application to organizations, see Eugene Schlossberger, *The Moral Duties of Organizations: Dual-Investor Theory and the Nature of Organizations*, in JOHN R. ROWAN & SAMUEL ZINAICH, JR., *ETHICS FOR THE PROFESSIONS* 173 (2003).

needs. However, there are important exceptions: situations can arise in which a fiduciary's ordinary pursuit of a client's interests conflicts with a strong public interest or ordinary morality.

Accordingly, there are two regions in which Dual-Investor theory tends to conflict with the prevailing fiduciary model: unethical pursuit of a client's interests and major conflicts between the client's and the public's interest. These two areas will be the focus of this article. Should (or may) the normal operation of a fiduciary in pursuing clients' benefits be exploitive or unfair to others? Should (or may) the ordinarily reasonable duties to a client's interest be subordinated to the public interest? Dual-Investor theory, by suggesting that fiduciaries must balance client and public interests, limits the range and extent of zealous duties. The prevailing concept of a fiduciary relationship must be amended, with appropriate changes in law, medicine, and other fields. More broadly, pragmatic factors that have led to the predominance in professional ethics of the prevailing concept should also be addressed. Some general considerations that touch upon these topics are raised in Part II. Part III examines test cases, while Part IV looks at trends and pragmatic ramifications of Dual-Investor theory.

## II. GENERAL CONSIDERATIONS

Given that professionals must balance serving society against serving the client whom they are paid to represent, there is no general reason to think that a defensible weighting always favors the client. Particular exceptions already occur in existing U.S. law. Physicians in most states are required to report bullet wounds.<sup>29</sup> Similarly, as noted above, therapists in most U.S. jurisdictions have a duty to warn when a client or patient poses a danger to others.<sup>30</sup> However, these legal exceptions are generally conceived as specific limitations upon the fiduciary relationship, which is held to be devoted exclusively to the benefit of the client. Attorneys, for example, must zealously represent their clients' interests, subject only to clearly defined restrictions that are relatively few in number and limited to extreme cases. Thus there is a natural alliance between the prevailing conception of the fiduciary relationship, invoking a broad range of zealous duties, and the use of strict rules. By contrast, a hundred years ago, attorneys were asked to balance being an advocate for the client against being an officer of the court, representing justice. On this view, the professional plays a

---

29. See, e.g., N.C. GEN. STAT. § 90-21.20(b) (2003) (requiring physicians to report "every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by, or appearing to arise from or be caused by, the discharge of a gun or firearm"); MASS. GEN. LAWS ANN. ch. 112, § 12A (West 2003) ("[T]he manager, superintendent or other person in charge thereof, shall report [bullet wounds] at once to the colonel of the state police and to the police of the town where such physician, hospital, sanatorium or institution is located . . .").

30. See *supra* note 12 and accompanying text.

dual role, representing not only the client but also the underlying values of a social institution. Architects, for example, must balance loyalty to artistic standards against the happiness of the clients who must live in the structures they design. Public relations professionals must balance the interests of the client against fairness, straightforwardness, and the public's right to know. This dual-hat conception of the professional, which requires a constant balancing of potentially conflicting loyalties, ill suits reliance upon strict rules, calling instead for the use of discretion within guidelines.

As always, in the conflict between discretion and strict rules, there is a trade-off. Strict rules offer greater predictability for clients, lessen the burden on professionals, mitigate the effect of an individual's bad judgment, and lessen the possibility of abuse (when, as Steven Shavell points out, administrators' aims diverge from society's).<sup>31</sup> They also evidence insensitivity to individual circumstances, often fly in the face of common sense, and, as Shavell also notes, cannot employ information not contained in the rules.<sup>32</sup> Ideally, then, some compromise between discretion and rules should be found. While the prevailing conception is heavily rule-oriented, a Dual-Investor conception of fiduciary relationships calls for flexibility within guidelines.

Thus the degree to which law and morals should be governed by strict rules or by a combination of rules, guidelines, and discretion constitutes one test battle between the prevailing conception of a fiduciary bearing zealous duties and the Dual-Investor conception requiring balance between client interests, fairness, and the public interest. Of course, legal reasoning, like moral reasoning, is always a matter of judgment in balancing diverse factors: discretion and judgment are ineradicable.<sup>33</sup> Conversely, a system based entirely on discretion fails to constitute the rule of law. It is a matter of degree: should the law be more or less rule-like.<sup>34</sup> The prevailing conception pushes the law far to the rule-like side. Dual-Investor theory suggests greater balance and moderation.

The complexity of the judgments to be made suggests that too rule-like an approach is inappropriate. Fiduciaries' zealous pursuit of client interests may be evaluated in terms of four features (each of which may, in turn, be the resultant of multiple considerations): the nature of the client interest pursued (whether it is a legitimate or improper interest), whether the advantage to be gained is an unfair advantage or an advantage merited by the client, whether the advantage to be gained by the client is significant (in terms of the value of the benefit, if achieved, as well as the likelihood of success), and the nature of the means

---

31. See Steven Shavell, *Optimal Discretion in the Application of Rules*, 9 AM. L. & ECON. REV. 175, 175-76 (2007).

32. *Id.*

33. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); Michael Hor, *Corroboration: Rules and Discretion in the Search for Truth*, 2000 SINGAPORE J. LEGAL STUD. 509; Morris R. Cohen, *Rule Versus Discretion*, 11 J. PHIL. PSYCHOL. & SCI. METHODS 208 (1914).

34. See also EUGENE SCHLOSSBERGER, A HOLISTIC APPROACH TO RIGHTS: AFFIRMATIVE ACTION, REPRODUCTIVE RIGHTS, CENSORSHIP, AND FUTURE GENERATIONS (2008).

employed. For example, a fiduciary's action may constitute a dishonest means of trivially enhancing the likelihood of obtaining a large, deserved advantage for the client in support of a legitimate interest. Another fiduciary's action might constitute a method harmful to a third party of significantly enhancing the likelihood of obtaining a moderate, unfair advantage for a client in support of a morally neutral interest. Significantly, there appears to be neither a lexical ordering of nor a straightforward common scale for gauging the relative strength of different factors. The unfairness of the advantage gained is not always more weighty than the legitimacy of the interest served. Thus particular unfair advantages must be weighed against particular legitimate interests. What scale might indicate that the unfairness of a particular advantage is worth -3 points while the legitimacy of a particular interest merits +2 points? It is problematic enough to develop a scale for measuring the unfairness of different sorts of unfair advantages, much less a method of comparing an advantage's degree of unfairness against the weight of an interest's legitimacy. Similarly, the means taken may be dishonest and also adversely affect a third party (whose relation to the transaction may be complex). How many units of dishonesty equal one unit of harm to the third party? By how many units is the harm done lessened by the degree of the third party's voluntariness in being affected by the fiduciary's action? Questions of this sort, as the cases in Part III illustrate, suggest that judgment and discretion are indispensable to setting limits on fiduciary pursuit of client interest: it seems inappropriate to rely entirely on strictly specified rules.

A second consideration supporting the Dual-Investor conception may be found in Jewish law. Rabbi Asher Meir points out that, according to Jewish law, the fiduciary relationship does not protect wrong action, since Jewish law holds that one may not delegate another to do wrong—it is forbidden for an agent to do wrong on behalf of a client.<sup>35</sup>

What arguments can be adduced in support of Jewish law? Shorn of institutional trappings, Jewish law does not normally approve of doing wrong for another's benefit. We do not generally regard as permissible a parent's cheating, lying, or stealing in order to advance the interests of a child. Parents are not morally justified in stealing the answers to an SAT exam because the theft will benefit their daughter. Of course, it may be precisely the institutional trappings that justify zealous duties. If so, the institutional trappings must provide some special justification that overrides the normal proscription of doing wrong on another's behalf. Thus a presumption exists against such fiduciary duties: absent special justification, it is wrong to do wrong for the sake of another. Hence, the burden of proof lies on those who assert that attorneys or physicians may or should do what would be wrong *pro se* in advancing their clients' interests.

What special justifications for fiduciary zealous duties can be given? One possible justification might be called the "democratic argument." The prevailing

---

35. See generally ASHER MEIR, THE JEWISH ETHICIST (2005).



notion is, by and large, the one that we, as a society, have chosen to adopt for ourselves through democratically established laws and regulations. The question remains, however, whether we *should* so choose. Moreover, laws and regulations pertaining to attorneys are mostly written by attorneys, and the electorate is, by and large, both ignorant of those laws and relatively apathetic. Few American voters are familiar in any detail with their state's laws regarding attorney-client confidentiality or other limitations on zealous advocacy and, in any case, roughly half of eligible voters do not participate even in presidential elections.<sup>36</sup> Thus, while, in some sense, the claims made by the democratic argument are correct, those facts are less indicative of popular approval than of the ignorance and apathy of voters. It is highly unlikely that laws resembling the ABA Model Rules would pass in a general referendum.

Perhaps the most obvious line of justification for fiduciary zealous duties invokes the kind of reasoning John Rawls highlights in *Two Concepts of Rules*.<sup>37</sup> Zealous duties are necessary for the faithful performance of the fiduciary role, the argument claims, and society benefits by the practice of individuals performing that role. For example, privileged communications are necessary for attorneys properly to defend their clients, who may need to reveal commission of what may be a crime in order to receive proper legal advice. Unless such admissions to an attorney are privileged, clients will not feel free to reveal the full set of relevant facts to attorneys, and clients will not receive the best legal representation. Society is best served by an institution of legal representation. Thus attorneys should respect client confidences even when keeping silent would ordinarily be wrong (e.g., entails serious harm to an innocent person).<sup>38</sup>

---

36. Figures vary, in part, because calculations divide voter turnout by different parameters, for example, U.S. citizens over the age of eighteen as opposed to total U.S. population over the age of eighteen (including non-citizens not eligible to vote). The U.S. Census reports that sixty percent of citizens eighteen and older voted in the 2000 Presidential election. AMIE JAMIESON ET AL., U.S. DEP'T COMMERCE, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, at 2 (2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf> (on file with the *McGeorge Law Review*). However, only fifty-five percent of the total population (including noncitizens) voted in the 2000 election. *Id.* PBS's NOW with Bill Moyers cited 54.4 as the percentage of eligible voters who voted in 1996, while Infoplease lists the percentage of the U.S. population over eighteen who voted in 1996 as 49.1. NOW, Politics and Economy, Election 2004, <http://www.pbs.org/now/politics/votestats.html> (last visited Apr. 6, 2008) (on file with the *McGeorge Law Review*); Infoplease, National Voter Turnout in Federal Elections: 1960–2006, <http://www.infoplease.com/ipa/A0781453.html> (last visited Apr. 6, 2008) (on file with the *McGeorge Law Review*). Similarly, Curtis Gans stated the figure was forty-nine percent and Bradley Siciliano and Jessica Green describe the figure as “less than half.” *Breaking News: Election 2000: Curtis Gans of the Committee for Study of American Electorate Discusses Voter Turnout* (CNN television broadcast Nov. 8, 2000), <http://transcripts.cnn.com/TRANSCRIPTS/0011/08/bn.08.html> (on file with the *McGeorge Law Review*); Bradley Siciliano & Jessica Green, *Get Out the Vote*, GOTHAM GAZETTE, Nov. 6, 2000, <http://www.gothamgazette.com/article/issueoftheweek/20001106/200/159> (on file with the *McGeorge Law Review*).

37. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

38. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962); CAL. BUS. & PROF. CODE § 6068(e) (West 2003 & Supp. 2007) (permitting, but not requiring, disclosure to prevent a criminal act that is likely to result in death or serious bodily injury). In recent years, exceptions to confidentiality have been broadened. The 2003 amended version of Model Rule 1.6, following, for example, Florida's Rule 4-1.6 and New Mexico's Rule

It does seem clear that some degree of fiduciary dedication is necessary for the institutions of law and medicine, but it is far from clear that the stronger claims required to justify current practices are correct. On what grounds might it be argued that most clients cannot receive reasonably adequate legal advice if they do not feel free to reveal the commission of serious crimes or that most patients cannot receive adequate medical care if their physicians balance their interests against public health considerations? What evidence exists that the exceptions to fiduciary zeal already recognized by law have undermined the practice of law, medicine, or therapy? As a result of physicians' duty to report bullet wounds, some patients with bullet wounds may avoid medical treatment, but such instances are rare, mostly involve felons rather than law-abiding citizens, and seem to have little impact on the ordinary person's use of physicians.<sup>39</sup> Therapists' duty to warn may occasionally result in a client being less forthcoming with his or her therapist. Such instances do sometimes include patients who have the most need to unburden themselves fully. Nonetheless, the legal imposition of a duty to warn appears to have had little effect on the ordinary use of therapy.<sup>40</sup> Other societies, including our own in earlier times, have maintained flourishing systems of law and medicine in the absence of powerful zealous duties.

Throughout much of our legal history, the evidentiary privilege served as the only rule restricting attorneys from disclosing information provided by their clients. Despite exceptions to and limitations on the rule, clients managed to seek legal assistance and to provide adequate information to obtain such assistance from their lawyers, with no other assurance of restriction on the use of the information disclosed to the attorney.<sup>41</sup>

Similarly, while society is clearly better off with the current system of legal representation than it would be with none, it is not clear that society would suffer if the current system was replaced with a more limited system of representation (as was the case in many societies) in which attorneys are required to balance client interest against the demands of justice. Little but dubious anecdotes or irrelevant comparisons to straw man alternatives supports the frequently made claim that the American system of law is the best system yet devised.

---

16:160, permits disclosure to prevent reasonably certain death or substantial bodily harm. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006); see also FLA. RULES OF PROF'L CONDUCT R. 4-1.6 (2003 & Supp. 2007) (requiring a lawyer to reveal information to prevent death or substantial bodily harm); N.M. RULES OF PROF'L CONDUCT R. 16:160 (2004) (stating that a lawyer should reveal information to prevent a client from committing a criminal act that is likely to result in imminent death or substantial bodily harm).

39. See John P. May et al., *Medical Care Solicitation by Criminals with Gunshot Wound Injuries: A Survey of Washington, DC, Jail Detainees*, 48 J. TRAUMA 130 (2000); Howard Ovens, *Why Mandatory Reporting of Gunshot Wounds is Necessary*, 170 CAN. MED. ASS'N J. 1256, 1257 (2004).

40. See ALAN A. STONE, *LAW, PSYCHIATRY, AND MORALITY: ESSAYS AND ANALYSIS* 161-91 (1984).

41. Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary*, 15 GEO. J. LEGAL ETHICS 477, 485 (2002).

Interestingly, public perception seems to disagree. For example, the Survey Research Program at Sam Houston State University's College of Criminal Justice found that, in 2007, forty-two percent of Texans lacked even "some" confidence in the adult criminal system, while only forty-five percent of respondents expressed confidence in the juvenile system.<sup>42</sup> In a 2000 Vermont study, only forty-six percent said the criminal justice system does a good job.<sup>43</sup>

In short, the argument appears to be guilty of the fallacy of false dilemma, as if the only two choices were extreme dedication to the interests of the client against society or no dedication at all to the client's interests. In fact, there is a wide range between those extremes, and it is far from clear that picking a more moderate balance between client interests and justice or social welfare would not permit attorneys or physicians to play their roles or that the modified institutions of law and medicine resulting from such changes would leave society worse off. Until a careful, fallacy-free argument is provided that a system of zealous duties serves society better than any other, the presumption against doing wrong for the sake of another suggests that fiduciaries should balance the pursuit of client interests against justice and social welfare.

Finally, a gaping moral loophole is created if it is morally permissible (much less required) for a fiduciary agent to do a wrong action simply because it is in the client's interest. An attorney could commit a wrong action with complete moral impunity by the simple expedient of finding a client who has an interest in the wrong action. I cannot absolve myself of blame for murdering my cousin for his inheritance simply by having my brother, who also inherits under my cousin's will, become my client. While murder lies beyond the bounds of fiduciary duties, the point applies equally to lesser transgressions.

While these arguments seem to bear some weight, it seems clear that fiduciary ties also bear moral weight. The situation is akin to ordinary promising. A householder agrees to keep confidential what her neighbor is about to tell her. The neighbor reveals something about which it would ordinarily be wrong to keep silent. The wrongness of keeping silent and the wrongness of betraying the promise must be balanced. Fidelity is at the heart of both promise-keeping and benefiting the client of a fiduciary relationship, and fidelity is of considerable moral importance. While respecting the call of fidelity outweighs some wrongs, fidelity has its limits. Few moral theorists urge keeping a promise to commit murder or perform other egregious moral wrongs. Balancing the importance of fidelity against other moral considerations appears to be the correct response.

---

42. See DENISE R. LONGMIRE & MICHAEL CAVANAUGH, SAM HOUSTON STATE UNIV., TEXANS' CONFIDENCE IN THE CRIMINAL AND JUVENILE JUSTICE SYSTEMS IN TEXAS: GENERAL REPORT, 2007 TEXAS CRIME POLL 12-13 tbl.3.1 (2007), <http://www.cjcenter.org/cjcenter/research/srp/cparchive/2007/Results.pdf> (on file with the *McGeorge Law Review*).

43. JUDITH GREENE & JOHN DOBLE, ATTITUDES TOWARDS CRIME AND PUNISHMENT IN VERMONT: PUBLIC OPINION ABOUT AN EXPERIMENT WITH RESTORATIVE JUSTICE 37 tbl.15 (2000), <http://www.ncjrs.gov/pdffiles1/nij/grants/182361.pdf> (on file with the *McGeorge Law Review*).

### III. TEST CASES

In addition to these general arguments, it is helpful to look at particular cases. As Rawls notes, reflective equilibrium requires balancing arguments for general principles against the intuitive correctness of the results.<sup>44</sup> Several cases seem to suggest the need for tempering zealous duties. In any case, these examples suggest the difficulty of resolving all troubling cases by a simple set of rules.

#### *Case 1: Cross Examination and Harm to Third Parties:*

Attorney William Smith represents T. Cox, accused of robbing a small grocery store. The main witness against Cox is Samantha Jones, who claims to have seen Cox emerging from the grocery store, brandishing a gun, on the night of the robbery.

1A. Smith discovers that Ms. Jones gave a housewarming party, during the course of which she conducted a tour of her house. Jones has been ruled a hostile witness and instructed to answer Smith's questions "yes or no." Hoping that at least one jury member may irrationally place less confidence in Jones' testimony if that jury member believes Jones is promiscuous, Smith can test Jones' recollection during cross examination by sneeringly asking Jones about each male member of the house tour and whether he has ever been in Jones' bedroom, falsely creating the impression that Jones is promiscuous. While the prosecution can bring out on redirect that the various males were in Jones' bedroom as part of a house tour, some damage to Jones' credibility may remain in the mind of at least one juror. Does the slim possibility of helping his client in this way justify Smith's deceptively humiliating and embarrassing Jones and creating a false, detrimental public perception?<sup>45</sup>

1B. Smith discovers that Jones was babysitting three-year-old Kevin, who accidentally killed his older brother while Jones was in the bathroom. Jones was held not to have been at fault. The true nature of what happened has been kept from Kevin, who is now ten years old. The trial is televised on a local cable station. It is conceivable that bringing out Jones' role in the accident seven years ago might possibly, irrationally, create some disfavor toward Jones in the mind of a juror.<sup>46</sup>

---

44. JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).

45. Although Federal Rule of Evidence (FRE) 403 would permit the judge to decide to exclude this line of evidence on the grounds of creating an unfair prejudice, the rule is meant to protect litigants rather than witnesses. FRE 403 weighs unfairness in the outcome of the case, not unfairness to the witnesses. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis . . . ." FED. R. EVID. 403 advisory committee's note.

46. Kevin's guardians are unlikely to know in advance that the damaging testimony will arise, and the

*Discussion:* When X brings suit against Y, it can be argued that X should expect to undergo unpleasant cross examination: X benefits from the suit, if successful, and X made the decision to institute proceedings. Thus, it might be argued, by bringing suit, X renders himself liable to the unpleasant effects of zealous cross examination. By contrast, Jones and Kevin are innocent third parties. Jones has no connection to the crime other than walking down the street at the time of the incident, has nothing to gain from the action against Cox, and had no direct voice in the decision to institute proceedings. Jones is merely doing her civic duty. Kevin has no connection to the crime and neither a voice in initiating nor something to gain from the action against Cox. Jones is an adult; the harm to her, while upsetting, is of a kind that most adults can handle, and Jones did agree to take the stand. Kevin is only ten. Most ten year olds would be severely traumatized by learning that they had killed a sibling. Kevin was offered no choice at all about becoming involved in the trial.

Arguably, if Cox is in fact innocent, he is entitled to use all available means to fight unmerited imprisonment. Must he forego even a remote possibility of avoiding unearned incarceration in order to avoid embarrassing Jones? And is not every defendant entitled to be presumed innocent until proven guilty? Yet it does seem that the price an innocent citizen must pay to do her civic duty should not be unmerited public humiliation and disrepute. It does seem that something has gone wrong when an innocent child is deeply traumatized for the sake of a nugatory advantage. Is there no role in such cases for moral judgment? Is a “one size fits all” approach preferable?

In general, the American legal system poorly protects the interests of third parties, who are not represented by those who control the action and whose needs and interests, however urgent, are, on the prevailing conception, entirely subservient to even the slightest advantage to be gained by clients represented by attorneys conducting the action.

*Case 2: Insurance and False Diagnosis:*

Therapist Rodriguez sees Herbert and Mary Carp, whose marriage is deeply troubled but, Rodriguez believes, salvageable with therapy. The Carps’ insurance covers treatment for depression but does not cover marital therapy. The Carps cannot afford therapy out of pocket. After explaining the situation to the Carps, Rodriguez enters on the insurance form for Herbert Carp a diagnosis of depression.

*Discussion:* It is quite common for therapists and other medical and mental health providers to “adjust” diagnoses to fit applicable insurance, believing that, in so

---

court is unlikely to be familiar with Kevin’s situation and anticipate the possible harm to Kevin. Without some action on the part of the defense attorney, steps to prevent the airing of the damaging information are unlikely to be taken. Explaining the situation to the court in advance is unlikely to advance Cox’s interests and may conceivably be detrimental to them.

doing, they are acting justifiably in the best interests of their clients/patients. Some therapists also adjust their diagnoses to accommodate clients' wish to receive the least "toxic" covered diagnosis. Few would heartily commend a therapist or medical provider who refused to make even the slightest adjustment of diagnosis to permit a patient or client to receive genuinely needed care. While, in some sense, such actions constitute fraud, providers often feel that insurance rules are arbitrary and unfair, are formulated to increase the profits of insurers, and interfere with the proper practice of their fields. Rodriguez, no doubt, feels that she is simply keeping a technicality from preventing the Carps from receiving the therapy they need and that, as the Carps' fiduciary, it is her responsibility to do so.

In fact, the situation is more complex. While insurance rules may often be arbitrary, if insurance companies as a group must pay more, they will charge more. The increased cost is typically passed on to the general public. For example, if the Carps' insurance is provided by the dairy company that employs Mary Carp, some of the cost of the Carps' treatment is ultimately included in the price of dairy products that consumers purchase. If the same insurance company also insures General Motors, some of the cost may be reflected in the price of GM cars. In general, the interconnectedness of the economy means that, ultimately, the cost is indirectly spread to everyone. Is everyone, from inner city single mothers to West Virginia coal miners, required to pay for the Carps' marital therapy?

More generally, we cannot afford to give everyone ideal care. Medical care always balances ideal care against cost. To give a moderate example, when a wealthy patient presents with a urethral infection, a culture is taken before the patient is given a course of antibiotics, at the end of which a second culture is taken. In poorer areas, patients are simply prescribed an antibiotic and told to return if the symptoms persist. The disparity in other instances is more extreme. Providing ideal medical care for everyone would require sacrifice of virtually all our resources, leaving little or nothing for education, for instance. Unattractive as it sounds, some mechanism is absolutely essential for providing less than ideal medical care for some patients. If physicians regard themselves as fiduciaries for their patients, seeking the best care for each patient regardless of social cost, then society cannot trust physicians, who must be closely overseen and regulated. As this happens more and more, physicians increasingly protest that they are being prevented from practicing good medicine. Ironically, this protested situation is the unavoidable consequence of physician behavior, guided by the prevailing conception of fiduciary duties.

### *Case 3: Physicians and the allocation of scarce medical resources:*

The prevailing fiduciary conception, if taken seriously, requires physicians to become single-minded advocates for their patients in medical allocation decisions. After all, if Dr. A is dedicated to benefiting

his client C over all others, and Dr. B is dedicated to benefiting her client D over all others, and C and D both need the only available kidney dialysis machine, Dr. A must be dedicated to doing his best to ensure that it is C who receives the treatment while Dr. B must be dedicated to doing her best to ensure that it is D who receives the treatment.

*Discussion:* While Dr. A should be not indifferent about whether it is C or D who receives treatment, a system of this sort is objectionable on several grounds. In such a system, the patient who receives treatment is the patient whose physician is best able to manipulate the system, a ground of allocation objectionable in almost every way. While similar things have been said about the legal system, it should be noted that while attorneys are chosen on the basis of their legal skills, physicians are not chosen on the basis of their political skill, and relatively little information about physicians' skill in this area is available to patients. Moreover, while attorneys' clients generally have the opportunity to speak for themselves, if they choose, before adjudicators such as magistrates and juries, patients needing medical resources are rarely able to address adjudicators directly. Thus patients would be totally dependent upon the unknown political (rather than medical) skills of their physicians in a way that litigants and defendants are not totally dependent upon the legal skills of their attorneys.

By contrast, under the Dual-Investor model, which suggests that Dr. A and Dr. B must balance their dedication to their patients against fairness and public welfare, Dr. A and Dr. B should bear some concern that the dialysis machine is fairly allocated.

#### *Case 4: Physicians and Dangerous Patients:*

Williams, a school bus driver, presents to his family doctor, Dr. Chan, with bronchitis, high blood pressure, and long-term fatigue. Arm markings and subsequent blood tests give clear evidence of frequent drug use. Should Dr. Chan notify the school board or other authorities?

*Discussion:* This case appears analogous, in some respects, to public health issues concerning communicable diseases and therapists' duty to warn. However, physicians' traditional duties of confidentiality militate against physician-initiated contact of and disclosure to outside authorities not explicitly required by law.<sup>47</sup> Dr. Chan would be quite reasonably worried that revealing the information, on his own initiative, might render him liable. Assuming, for the sake of discussion, that state law leaves the matter within Dr. Chan's discretion, does the fiduciary relationship between Dr. Chan and Williams truly override the possible deaths of a busload of innocent schoolchildren? While a compromise course

---

47. For an additional argument that medical confidentiality must be balanced by the medical practitioner against public welfare or other moral considerations, see Richard H.S. Tur, *Medical Confidentiality and Disclosure: Moral Conscience and Legal Constraints*, 15 J. APPLIED PHIL. 15 (1998).

might be to counsel Williams to receive help and suggest that Williams himself notify the board or other authority and/or stop driving in the interim, such counseling may be ineffective or take considerable time. Should a fatal, drug-related accident occur during the time Dr. Chan is attempting to convince Williams to take these steps, the deaths of the children become, to some extent, Dr. Chan's responsibility.

Two other cases concerning physician confidentiality, both familiar from the medical ethics literature, deserve mention.<sup>48</sup>

*Case 5: Physicians' Tacit Participation in Patient Deception:*

Sheila Bros needs a kidney transplant. Her parents and siblings are tested for histocompatibility. Only her father, William Bros, is histocompatible and able to donate a kidney. William Bros, fearful of the operation and of losing a kidney, announces to the rest of the family, in the presence of his physician Dr. Aswan, that he is not histocompatible. The family naturally construes Dr. Aswan's silence as confirmation of William Bros' statement.

*Case 6: Physicians and Informing Non-Patients:*

The Greens, both of Ashkenazy origin, are considering having children. Rebecca Green is tested by Dr. Gruben for Tay-Sachs and told she has a recessive gene. Dr. Gruben suggests she inform her siblings, who are also married and of child-bearing age. Rebecca Green refuses to inform either her husband or her siblings, informing Dr. Gruben that she will surreptitiously avoid pregnancy and that her siblings can look out for themselves.

Other cases deserving consideration can be found in almost every field. For example, if a managerial accountant becomes aware of a business move that would save several hundred dollars for the large corporation that employs him but would result in hundreds of employees losing their pension benefits, should he inform executives at his corporation of the option, despite the smallness of the gain to his employer and the severity and extent of the harm?

It seems unlikely that in all of these and other cases, the ethically correct solution requires the fiduciary to ignore the demands of fairness and the pressing needs of non-clients. While these few cases give but a small sample of the diverse range of instances arising across the professions, they suggest it is unlikely that any rule or sharp principle will draw a satisfactory line limiting zealous duties. Fiduciary dedication to client welfare, on the one hand, and fairness, decency, and the needs of non-clients, on the other, must be balanced on

---

48. Versions of both cases are described or discussed in several medical ethics textbooks, including THOMAS M. GARRETT ET AL., *HEALTH CARE ETHICS: PRINCIPLES AND PROBLEMS* (1989).



a case-by-case basis. Relevant factors may be identified that assist in making a reasonable decision. Case 1, for example, suggests that one relevant factor is the extent to which adversely affected third parties had a choice about becoming involved. The fact that Kevin had no choice makes the harm to him count more than it would had Kevin had some choice about becoming involved. But no related rule can be used to decide cases. It is untenable to insist that the interests of any third party who did have a choice about becoming involved deserve no consideration or that the interests of any third party who did not have a choice deserve consideration equal to the client's interests. In short, cases like those above call for what *The Ethical Engineer* dubs "reason-guided casuistry," that is, articulating a corpus of relevant (though not necessarily decisive) factors and then giving reasons for thinking that, in the instant case, some of those factors are more pertinent than others.<sup>49</sup>

The approach called for by the prevailing conception, that fiduciaries pursue client advantage in all ways not specifically excepted by a clear rule of law, seems ill-suited to these cases.

#### IV. TRENDS AND RAMIFICATIONS

The growth of zealous duties in law and the ethics literature is not an isolated phenomenon: it reflects some broader trends in law and American society.<sup>50</sup> If there is moral reason to wish to resist the prevailing conception of fiduciary relationships, then there is at least some reason to consider addressing those aspects of law and society that support the prevailing conception.

The law has increasingly assumed the task of defining fiduciary relationships across the professions, in part because an increasingly litigious society has forced courts to do so. For example, individual therapists, influenced by their professional organizations and the shared morality of their field, used to decide whether to warn others when clients or patients posed a danger to themselves or to others. The *Tarasoff* case,<sup>51</sup> a civil suit, brought the duty to warn squarely under the sway of courts. In thinking about fiduciary relationships in therapy, medicine, real estate, and so forth, jurists begin their thinking, implicitly or explicitly, by reflecting on the most prominent fiduciary relationship in their own field, the attorney-client relationship. Most judges and legislators have been attorneys, and it would be unrealistic to expect a judge or legislator who had spent many years as an attorney to ignore that experience entirely when thinking about medical or financial fiduciaries. As a result, the attorney-client relationship has increasingly become the paradigm for fiduciary relationships across the professions.

---

49. See generally SCHLOSSBERGER, *THE ETHICAL ENGINEER*, *supra* note 13.

50. See generally GEOFFREY C. HAZARD JR., *ETHICS IN THE PRACTICE OF LAW* (1978).

51. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976).

In turn, the attorney-client relationship, at least in the United States, has shifted dramatically over the past hundred years in the direction of zealous duties. The obligation of the attorney to balance, as an officer of the court, the demands of justice against client interests for which he or she is an advocate all but disappeared from American legal ethics,<sup>52</sup> although recent years have seen some amelioration of this trend. Four broad trends may be cited in explaining this shift.

*A. The Cultural Loss of Faith in Justice and Reason*

Balancing client interests with the demands of justice and public welfare has traditionally depended on confidence in the integrity of the notion of justice; confidence in our ability to discern, however fallibly, its dictates; and confidence that reason can assist in discovering a genuinely reasonable compromise. The increasing influence of postmodernism, relativism, skepticism, and anti-intellectualism in American life and attitudes has resulted in wide-scale erosion of confidence in the very notion of justice, in our ability to discover moral truth, and in the possibility of finding a reasoned compromise. Thus the traditional ethical task of the attorney has increasingly come to be seen as impossible or hopelessly arbitrary.

*B. The Disadvantage of Hiring an Attorney with Scruples*

The traditional requirement that attorneys balance client interest against justice has meant that clients with unscrupulous attorneys gained an advantage over clients with more scrupulous attorneys, thus giving attorneys with fewer compunctions a market advantage over their more fastidious colleagues. Conscientious attorneys felt squeezed between their consciences and market pressure to pursue client advantage in every possible way. Current ABA Model Rules, by requiring zealous duties, require conscientious attorneys to use many of the same methods of pursuing client advantage that, in a past age, were employed by unscrupulous attorneys, thus erasing the difference.

*C. A Shift in Law Toward Rules Over Discretion*

As noted in Part I, balancing justice and client interest is a matter of exercising discretion. In contrast, the prevailing notion lends itself to rules that

---

52. See HAZARD, *supra* note 50, at 15-43. This was written during the zenith of zealous advocacy in the law. The few exceptions at that time tended either to protect attorneys, such as the permission to divulge confidential information in order to collect a fee or defend against a charge of misconduct, or were easily circumvented. For example, an attorney can circumvent the requirement not to suborn perjury by allowing her client to tell her or his story only after she has explained the advantages of telling story X. See *supra* note 38 (illustrating that exceptions in various states have since been broadened).

specify the limits of fiduciaries' zealous pursuit of client interests. Three features of the legal landscape in America have favored the dominance of rules over the use of discretion.

- a) The increasing corporatisation of law firms. Judicious balancing of conflicting duties seems most feasible when the model of legal practice is that of a single decision-maker, as is the case in a single-attorney practice or in a firm in which cases are given to individual, largely autonomous attorneys. When major decisions are centralized, rules must play a larger role, since committees or executives can lay down rules governing numerous subordinates but cannot make individual discretionary decisions for large numbers of subordinates. The trend in American law firms has been away from single lawyer firms and away from attorneys within a firm practicing as autonomous agents toward larger size, centralization, and committee handling of or oversight of cases. As a result, rules better suit many modern law firms.
- b) The centrality in modern law of anti-discrimination issues. The use of discretion is subject to abuse and discrimination while the use of rigid rules frequently defies common sense. Good law thus requires finding a workable balance between rules and discretion. In recent years, the importance in American litigation and judicial reasoning of avoiding discrimination has tended to favor the use of rules over the use of judgment, discretion, and common sense.
- c) The stricter enforcement of ethics. In the past, ethics (apart from the most serious violations) were often considered the personal province of individuals and not the concern of law or other enforcement mechanisms. Clients had little recourse other than choosing fiduciaries carefully. Over time, the law and other enforcement mechanisms, such as censure by professional organizations, took increasing cognizance of ethics. While lax enforcement meant that fiduciaries were, in practice, free to pursue client advantage at the expense of justice and social welfare, strict enforcement forced the law to choose between requiring zealous duties or proscribing them. The principle of *nulla poena sine lege* required ethical obligations to be spelled out in increasing detail, favoring detailed rules over the use of discretion.

These factors exert continuing pressure toward the adoption of zealous duties in law and moral thinking. Pragmatically, then, the adoption of a Dual-Investor model of fiduciary relationships suggests countering these tendencies to some extent. It must be emphasized that the issue concerns adjusting the balance rather than radically reversing course. It would be wrong to erase all the progress made

in anti-discrimination law by eliminating rules in favor of unfettered discretion, but perhaps some correction is needed in the delicate balance between discretion and rules. It would be ill-advised to turn the practice of law into a field of independent and unregulated gladiators, but modern law firms may need to restore some greater measure of autonomy to attorneys within the firm. No one would sensibly urge a return to the days of legal neglect of egregious wrongs for which there was no remedy, but perhaps the law has gone too far in the direction of defining fiduciary obligations and enforcing ethics. Without returning to a Spinozistic conception of ethical thinking as a species of geometrical reasoning, relief from facile relativism and skepticism seems long overdue.

Finally, adopting a Dual-Investor model of fiduciary relationships helps the virtue of responsibility regain a more prominent place in our moral landscape. The prevailing view conceptualizes the fiduciary largely as an extension of the individual client's will, emphasizing client autonomy and self-interest almost exclusively, at the expense of social and institutional responsibilities. The Dual-Investor model balances client autonomy and welfare against the social responsibilities of both individual clients and practitioners as well as the institutional responsibilities of the profession as a whole. Fiduciary relationships are but one small part of the moral picture, but, in the age of Enron, any significant step toward inculcating responsibility is a welcome one.

\* \* \*